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No. 85-1121

In the Supreme Court of the United States

October Term, 1985

RICHARD A. PLEHN, INC., and RICHARD A. PLEHN,

Petitioners,

v.

IMPERIAL BANCORP, and IMPERIAL BANK,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

As they have during the entire course of this appeal, Imperial Bancorp and Imperial Bank ("Imperial") continue to avoid the pivotal question which controls application of the substantial compliance doctrine, namely: was the purpose of California's real estate broker licensing statute served in this transaction. Imperial does not assert it was ever exposed to the perils of dealing with incompetent or untrustworthy brokers or in some other way denied the full protection of the licensing statute. Nor does Imperial even theorize as to how the purpose of the licensing statute might have been disserved in this case. Instead, Imperial wholeheartedly endorses the Ninth Circuit's conclusion that the style of the

transaction ("co-brokered" by Richard Plehn and Plehn, Inc.) necessarily forecloses the substantial compliance doctrine. This mechanical analysis ignores the purpose of the substantial compliance doctrine, is not supported by any applicable California decisions and is totally irreconcilable with the principles set forth in *Asdourian v. Araj*, 38 Cal. 3d 276, 696 P.2d 95, 211 Cal. Rptr. 703 (1985).

ARGUMENT

1. The Fact That Richard Plehn Acted As A "Co-Broker" In This Transaction With Plehn, Inc. Does Not Foreclose Application Of The Substantial Compliance Doctrine.

In utter disregard of the reasoning in *Asdourian v. Araj*, Imperial maintains that the mere *form* of the transaction controls the question of substantial compliance. Imperial quotes extensively various portions of the record indicating that Richard Plehn, the individual, co-brokered this transaction with his New York corporation, Plehn, Inc. [Imperial's opposition brief, pp. 9-12.] The purpose of these quotations is a mystery. Petitioners have never denied that Plehn acted as a co-broker with Plehn, Inc. and expressly acknowledged this fact in their petition to this Court. [Petition, p. 7.] Nor have petitioners ever stated that they should be viewed as a "single person" for purposes of the licensing law as Imperial falsely asserts. Rather, what petitioners have consistently maintained is that the services provided by the individual, Plehn, and the corporation, Plehn, Inc., were exactly the same insofar as only Plehn, the individual, who wholly owns and controls the corporation, was physically expending time and energy to locate a mortgage lender and joint venture partner for Imperial's project.[1] The question is whether a finding of substantial compliance must be made on these facts. The answer, as a matter of law, is yes.

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[1]Imperial asserts that Plehn, Inc. operated through the efforts of another individual besides Richard Plehn in this transaction. Despite the existence of seven depositions in this case which

Asdourian prescribes the following test for determining whether the doctrine of substantial compliance is applicable in a given fact situation: "(1) [whether] . . . plaintiff held a valid license at the time of contracting, (2) [whether] . . . plaintiff readily secured a renewal of that license, and (3) [whether] . . . the responsibility and competence of

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represent over 1600 pages of testimony the only evidence Imperial cites in support of this contention is a one page declaration by Richard Staff submitted by petitioners early in this litigation when the District Court's diversity jurisdiction was in issue. The substantive portion of this declaration states *in full:*

> 2. I have never been employed by Richard A. Plehn, Inc., a California corporation.
>
> 3. On approximately June 22, 1982 I met with George M. Eltinge of the Board of Imperial Bancorp, over breakfast at the Helmsley Palace Hotel. Among other things, during the course of that meeting I discussed with Mr. Eltinge its joint venture between Imperial and Metropolitan Life Insurance Company regarding improvement of Imperial's Wilshire and Figueroa property in Los Angeles, California.

[C.R., D. 10, tab. 10, p. 31.]

The declarant, Richard Staff, performs purely routine administrative functions for Plehn, Inc. and was not in any way engaged in the process of locating a mortgage lender and joint venture partner for Imperial's office project. These facts are not in the record only because Imperial never even mentioned its single contact with an employee of Plehn, Inc. until this case was already on appeal. What facts are in the record (declaration above) in no way indicate that Mr. Staff performed brokerage services. Therefore, if there is a genuine factual question as to whether any natural person other than Richard Plehn was acting on behalf of Plehn, Inc. in finding a mortgage lender for Imperial, then summary judgment should have been denied. *Free v. Bland,* 369 U.S. 663, 671 (1962).

Moreover, under *Asdourian,* the relevant inquiry is whether the responsibility and competence of the "managing officer" of the unlicensed entity were officially confirmed throughout the period of contract performance. *Asdourian,* 38 Cal. 3d at 286. This is indisputably the situation here, since Richard Plehn, a licensed California real estate broker, wholly owns and manages Plehn, Inc.

plaintiff's managing officer were officially confirmed throughout the period of performance of the contract." 38 Cal. 3d at 284. Petitioners demonstrated in their petition that under the Supreme Court's analysis in *Asdourian*, these criteria are satisfied in this case. Imperial makes no attempt to argue otherwise in its opposition. Instead, Imperial struggles to avoid addressing the test on its merits by attempting to distinguish *Asdourian* on the ground that the case involved a sole proprietorship and not a corporation.

Imperial ignores the fact that the very test applied by the Supreme Court in *Asdourian* was originally developed by the Supreme Court in *Latipac, Inc. v. Superior Court*, 64 Cal. 2d 278, 411 P.2d 564, 49 Cal. Rptr. 676 (1966), a case which directly involved an *unlicensed corporation*. In *Latipac* the plaintiff, a *corporation* named "J.W. Lee & Co.," brought an action to recover for labor and materials furnished to defendant pursuant to a contract. The record disclosed that J.W. Lee & Co. was not licensed as a contractor for almost a one year period of time during which the contract was partially performed and completed. 64 Cal. 2d at 285. However, throughout the period of performance of the contract, valid licenses existed in the names of *other* corporations through which the managing officer of J.W. Lee & Co., ("J.W. Lee") operated. *Id.* These other corporations had obtained their licenses based on the confirmed qualifications of J.W. Lee. On these facts the California Supreme Court reasoned that the policy of the contractor's licensing statute was satisfied:

> Plaintiff's "responsible managing officer" is Mr. J.W. Lee. It is by virtue of Mr. Lee's qualifications that plaintiff secured and holds its contractor's license. Mr. Lee and his associates conduct their affairs through a number of related corporations. The qualifications of Mr. Lee form the basis for the licenses of a number of these corporations. One of them, San Leandro Rock Co., possessed a valid contractor's license throughout the period that

> plaintiff was performing its contract with defendant. The existence of this license necessarily evidences an official determination of the experience and competence of Mr. Lee, the same experience and competence which would have been in issue in a consideration of plaintiff's application for renewal of its license. This official confirmation of Mr. Lee's qualifications *throughout the period of performance* should exorcise any remaining doubt that the policy of the statute has been satisfied in this case.

Id. at 285-286 (emphasis in original).

Significantly, in *Knapp Development & Design* v. *Pal-Mal Properties, Ltd.*, 173 Cal. App. 3d 423, 219 Cal. Rptr. 44 (1985) the Court of Appeal rejected the very argument Imperial asserts here—that the principles of *Asdourian* apply only to a sole proprietorship and not a corporation:

> While *Asdourian* involved an individual and a sole proprietorship and the instant case involves an individual and a corporation, that distinction does not compel a different result here. As previously noted, when examining the third *Latipac* factor, where there has been official confirmation of the responsibility and competence of plaintiff's managing officer, no distinction is made on the question whether the entity holding the license is legally liable on the contract.

Id. at 435.

Imperial attempts to distinguish *Knapp* on the ground that the unlicensed corporate entity and the other party to the construction agreement in issue were controlled by the same person. Contrary to Imperial's assertion the Court never stated or even implied that this fact was essential to its finding of substantial compliance. The Court took note of this fact only *after* it concluded that the third factor of the *Latipac* test (confirmation of the responsibility and competence of

the plaintiff's managing officer) was satisfied. 173 Cal. App. 3d at 435. The Court thus suggested that this fact constituted an *additional* but not a necessary basis for its finding of substantial compliance.

Moreover, as in *Knapp*, circumstances exist in this case which support application of the substantial compliance doctrine independent of the fact that the *Latipac* criteria are satisfied. The record discloses that "Richard A. Plehn and Richard A. Plehn, Inc., a New York corporation, had had prior similar dealings with George M. Eltinge and George Graziado [officers of Imperial] as individuals and partners, in which the plaintiffs [petitioners here] were compensated in a similar manner for similar services rendered." [E.R., t. 32, last exhibit, p. 9, lines 18-23; quoted by Imperial on p. 10 of its opposition brief.] Surely these facts dispel any possible complaint by Imperial about Richard Plehn's capabilities as a real estate broker.

In re Estate of Baldwin, 34 Cal. App. 3d 596, 110 Cal. Rptr. 689 (1973) also confirms that a corporate plaintiff may invoke the doctrine of substantial compliance. The doctrine was held applicable in *Baldwin* because of the trial court's finding that it was through the efforts of the licensed manager of the *unlicensed corporation* that the brokerage work was performed. *Baldwin*, 34 Cal. App. 3d at 602. The identical facts are present here.

Finally, despite the fact that *General Insurance v. Superior Court*, 26 Cal. App. 3d 176, 102 Cal. Rptr 541 (1972) involved an unlicensed corporation the decision was disapproved by the Supreme Court in *Asdourian*. If the Supreme Court had meant to preserve the integrity of *General Insurance* on the ground that the unlicensed entity was a corporation it could easily have said so. Instead, the Supreme Court clearly indicated that in *General Insurance*, the Court of Appeal should have weighed equitable considerations when examining the licensing issue. 38 Cal. 3d at 287-288. Imperial asserts that the Supreme Court merely "chided" the Court in *General Insurance*. Whatever Imperial means by this

ambiguous assertion, it is beyond question that the decision no longer supports Imperial's original contention that the doctrine of substantial compliance is inapplicable under the facts of this case.

Imperial also contends that Plehn, Inc.'s failure to maintain an office in California precludes application of the substantial compliance doctrine. [Imperial's brief, p. 16.] Here again Imperial seizes upon non-substantive matters in attempting to avoid the principles of *Asdourian*. It is undisputed that Richard Plehn maintains a business officer in California as required by the real estate broker licensing statute. The *Latipac* criteria cannot be disregarded on the facile grounds proposed by Imperial.

The decisive question in all cases which address the issue of substantial compliance including *Asdourian v. Araj*, *Latipac, Inc. v. Superior Court*, *In re Estate of Baldwin*, *Knapp Development & Design v. Pal-Mal Properties, Ltd.*, and *Schantz v. Ellsworth*, 19 Cal. App. 3d 289, 96 Cal. Rptr. 783 (1971) is whether, regardless of the form of the transaction, the purpose of the licensing law is satisfied. *Asdourian* prescribes an approach to this question which was completely ignored by the Ninth Circuit. There is absolutely no indication in the record that the Court of Appeals considered the *Latipac* criteria or that it weighed equitable considerations as mandated by *Asdourian*.

While petitioners acknowledge that this Court will not ordinarily grant certiorari to review a decision of a Circuit Court interpreting state law, where, as in this case, the Circuit Court has obviously disregarded controlling authorities decided by the state's highest court, this Court's exercise of its supervisory power is warranted. *Huddleston v. Dwyer*, 322 U.S. 232 (1944). Petitioners seek no more from this Court than an order directing the Ninth Circuit to consider and apply the principles announced by the California Supreme Court in *Asdourian* and *Tenzer v. Superscope*, 39 Cal. 3d 18, 216 Cal. Rptr. 130 (1985).[2]

[2]Imperial's assertion that petitioners "fail to mention" in their

2. As Imperial Itself Admitted Below, *Tenzer v. Superscope* Is Controlling Authority In This Case.

Imperial disingenuously asserts that *Tenzer v. Superscope* has no application to this matter because the action on the contract was barred under the statute of frauds and not a licensing statute. Imperial neglects to mention that it cited and relied extensively on the vacated decision of the Court of Appeal in *Tenzer* in its Motion for Summary Judgment [E.R., t. 32, pp. 32, 33] and in its brief to the Ninth Circuit [Appellee's Brief, p. 30]. If Imperial truly believed that the circumstances involved in *Tenzer* did not provide a valid basis for resolving petitioner's fraud claim, why did it state the exact opposite below?

Nothing in the *Tenzer* opinion remotely supports Imperial's contention that the holding has no application outside the context of the statute of frauds. To the contrary, the rule of *Tenzer* applies in any situation where a claim on the contract is barred by operation of law. This is clear from the California Supreme Court's statement of the rationale underlying its holding: "[r]ather 'something more than nonperformance is required to prove the defendants' intent *not to perform his promise.*' [Citations omitted.]" 39 Cal. 3d at 30 (emphasis added).

Imperial's contention that *Tenzer v. Superscope* does not apply because the contract is "illegal" under Business & Professions Code §10139 is patently erroneous. In *Norwood v. Judd*, 93 Cal. App. 2d 276, 209 P.2d 24 (1949) the Court of Appeal ruled that a licensed contractor could bring an action in equity for dissolution of a partnership and for an accounting notwithstanding that the partnership had never secured a license and thus had operated "illegally." *Norwood*

Petition to this Court that *Asdourian* and *Tenzer* were brought to the Ninth Circuit's attention (Imperial's Brief, p. 3) is false. This fact was clearly disclosed in the Petition (pp. 3-4), and formed the basis for petitioners' reliance on *Huddleston v. Dwyer*.

involved a statute analogous to §10139 which provided: "Any person who acts in the capacity of a contractor without a license . . . is guilty of a misdemeanor." *Norwood,* 93 Cal. App. 2d at 281, quoting former Business & Professions Code §7030. Notwithstanding this statute the court permitted recovery, stating:

> The rule that the courts will not lend their aid to the enforcement of an illegal agreement or one against public policy is fundamentally sound. . . . But the courts should not be so enamored with the Latin phrase "in pari delicto" that they blindly extend the rule to every case where illegality appears somewhere in the transaction. The fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered. Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied.

Id. at 288-289. As *Norwood* reveals, even if petitioners' contract claim is barred, Business & Professions Code §10139 does not prevent petitioners from invoking the rule of *Tenzer* to recover on their claim for fraud.

Finally, Imperial's contention that "the California Supreme Court in *Tenzer* made clear that its holding even as to the statute of frauds only applied to finders, and not to brokers" [Imperial's Brief, p. 22] is utterly false. The very case disapproved by the Supreme Court in *Tenzer, Kroger v. Baur,* 46 Cal. App. 2d 801, 117 P.2d 50 (1941), involved a suit by real estate *broker* not a finder.

CONCLUSION

Imperial fails to demonstrate that the Ninth Circuit properly considered and applied controlling authorities decided by the California Supreme Court while this case was sub judice. This Court should direct the Ninth Circuit to do so.

DATED: February 13, 1986

Respectfully submitted,

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on February 13, 1986, I served the within *Reply to Opposition to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 13, 1986, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)